Filed 11/14/19 P. v. Swetnam CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LISA LYNN SWETNAM, Defendant and Appellant.	F077286 (Fresno Super. Ct. No. F11904186) **OPINION**

APPEAL from an order of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Michael L. Pinkerton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Lisa Lynn Swetnam appeals from an order denying her petition for resentencing filed pursuant to Proposition 47. She contends the superior court should

have granted her petition and reduced her felony conviction for identity theft (Pen. Code[1], § 530.5, subd. (a)) to a misdemeanor.

We affirm the superior court's order for the reasons set forth below.

FACTS

In April 2011, A.L.'s driver's license was stolen.[2] Appellant purchased A.L.'s stolen driver's license. Appellant also bought stolen blank checks that belonged to other people. Appellant modified and altered the stolen checks to place A.L.'s name and identifying information on them.

On May 17, 2011, appellant went to a Food Maxx grocery store and used one of the altered checks to purchase $129.15 worth of merchandise. On the same day, she went to a Save Mart grocery store, used another altered check, and purchased $190.76 worth of merchandise.

The charges

On July 28, 2011, a felony complaint was filed in the Superior Court of Fresno County, case No. F11904186, charging appellant with 42 felony counts of multiple offenses including identity theft; second degree burglary (§§ 459/460, subd. (b)); identity theft with a prior conviction (§ 530.5, subd. (c)); receiving stolen property (§ 496, subd. (a)); forgery of government identification (§ 470, subd. (a)); and forgery (§ 476), with two prior prison term enhancements (§ 667.5, subd. (b)).

As relevant to this case, the felony complaint alleged count 1, identity theft of A.L.; count 2, second degree commercial burglary of Food Maxx; count 3, another

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] Given appellant's no contest pleas and waiver of a probation report, the following facts are from appellant's brief filed in support of her petition to reduce her felony convictions to misdemeanors. When appellant entered her pleas, she stipulated to the police reports for the factual basis. We have repeated appellant's factual summary here only to give a background for her petition. Appellant did not file any documentary evidence or the police reports to support the factual assertions in her petition, particularly relating to the amounts of the checks that were used on May 17, 2011.

identity theft charge related to A.L.; and count 4, second degree commercial burglary of Save Mart, with all offenses alleged to have been committed on or about May 17, 2011.

Appellant's pleas

On September 7, 2011, appellant entered into a negotiated disposition in case No. F11904186 for a stipulated term of four years. She pleaded no contest to count 1, felony identity theft of A.L., and count 2, felony second degree commercial burglary of Food Maxx. She admitted two prior prison term enhancements that were based on prior convictions for grand theft in 2009 and receiving stolen property and burglary in 2005.

The parties stipulated to the police reports as the factual basis for the pleas. The prosecutor dismissed the remaining 40 felony counts. Appellant waived her right to a probation report.

Sentence

On September 14, 2011, the court denied probation and sentenced appellant to an aggregate term of four years in prison: the midterm of two years for count 1, identity theft, with two consecutive one-year terms for the prior prison term enhancements; and a concurrent midterm of two years for count 2, commercial burglary. Appellant received 168 days in presentence custody credits. The court also imposed various fines and fees.

APPELLANT'S PETITIONS

On December 29, 2017, and January 18, 2018, appellant filed petitions pursuant to Proposition 47 for the court to reduce her felony convictions in multiple cases to misdemeanors.

Appellant's petition included her felony convictions in case No. F11904186. She argued count 1, identity theft, should be reduced to a misdemeanor, and count 2, second degree burglary, should be reduced to misdemeanor shoplifting.

As to count 1, appellant acknowledged that identity theft was not expressly within the provisions of offenses listed in Proposition 47 but argued *People v. Gonzales* (2017) 2

Cal.5th 858 (*Gonzales*) held the offense was a form of theft and thus eligible for reduction to a misdemeanor.

The superior court's denial of the petition

On March 26, 2018, the court conducted a hearing on appellant's petitions and reviewed the various cases. The court granted relief in some of her cases and reduced her felony convictions to misdemeanors.

As to case No. F11900186, the court granted appellant's petition as to count 2, felony commercial burglary, and reduced the offense to misdemeanor shoplifting (§ 459.5).

As for count 1, identity theft, defense counsel asserted that *Gonzales* held identity theft was a theft-related offense and could be reduced to a misdemeanor theft offense under Proposition 47. The prosecutor replied identity theft was not a "theft" offense within the meaning of Proposition 47 and section 1170.18, and that *Gonzales* did not hold otherwise.

The court denied appellant's petition to reduce identity theft to a misdemeanor, and found the offense was ineligible for reduction under the provisions of Proposition 47.

DISCUSSION

I. The Court Correctly Denied Appellant's Petition

Appellant contends the superior court improperly denied her petition to reduce her felony conviction for identity theft to misdemeanor shoplifting.

A. Proposition 47

In November 2014, California voters enacted Proposition 47, which "created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be

'resentenced to a misdemeanor … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

The petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility under Proposition 47. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880.) The court then determines whether the petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) The court's factual findings are reviewed "for substantial evidence and the application of those facts to the statute de novo. [Citation.]" (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960.) The record is viewed in the light most favorable to the trial court's ruling with a presumption that the order was correct. (*Ibid*.)

B. Misdemeanor Shoplifting and Petty Theft

"… Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history. The redefined offenses include: shoplifting of property worth $950 or less (Pen. Code, § 459.5, subd. (a)); forgery of instruments worth $950 or less (Pen. Code, § 473, subd. (b)); fraud involving financial instruments worth $950 or less (Pen. Code, § 476a, subd. (b)); theft of, or receiving, property worth $950 or less (Pen. Code, §§ 490.2, subd. (a), 496, subd. (a)); petty theft with a prior theft-related conviction (Pen. Code, § 666, subd. (a)); and possession of a controlled substance (Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a))." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597–598; *People v. Martinez* (2018) 4 Cal.5th 647, 651–652.)

"Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor 'where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).' (§ 459.5, subd. (a).) '[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered "a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours," and whether "the value of the

property that [was] taken or intended to be taken" exceeded $950. (§ 459.5.)' [Citation.]" (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448.)

Theft by false pretenses, as well as other forms of nonlarcenous theft, satisfies the requirement of the shoplifting statute – that a person must enter a commercial establishment "with intent to commit 'larceny.' " (*Gonzales, supra*, 2 Cal.5th at p. 862; § 459.5.)

Proposition 47 also added section 490.2, subdivision (a), which defines misdemeanor petty theft and states:

> "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

The addition of section 490.2 specifically reduced punishment for the "category of theft crimes … that could previously be 'charged as grand theft' simply because 'the crime involves the theft of certain property' " by creating a $950 threshold regardless of the type of property involved. (*People v. Romanowski* (2017) 2 Cal.5th 903, 910 (*Romanowski*).)

C. Section 530.5

Appellant's petition sought to reduce her felony conviction for identity theft in violation of section 530.5, subdivision (a) to a misdemeanor. While this crime has been described as identity theft, the statute specifically defines the offense as the "[u]nauthorized use of personal identifying information of another person." (*Ibid*.)

> "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information

> without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170." (*Ibid.*)[3]

"[T]he purpose of section 530.5, subdivision (a) is to criminalize the willful use of another's personal identifying information, regardless of whether the user intends to defraud and regardless of whether any actual harm or loss is caused. [Citation.]" (*People v. Johnson* (2012) 209 Cal.App.4th 800, 818.)

The elements of a violation of section 530.5, subdivision (a) are "(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used. [Citations.]" (*People v. Barba* (2012) 211 Cal.App.4th 214, 223, fn. omitted.) "[A]ctual injury or loss is not an element of the offense …." (*People v. Johnson, supra*, 209 Cal.App.4th at p. 818.) "[I]t is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455.)

"Although commonly referred to as 'identify theft' [citation], the Legislature did not categorize the crime as a theft offense. Thus, while section 484e [acquisition or possession of access card information] is found – along with section 496 – in part 1, title 13, chapter 5, 'Larceny,' section 530.5 is in chapter 8, 'False Personation and Cheats.' " (*People v. Truong* (2017) 10 Cal.App.5th 551, 561.) Instead, identity theft seeks to protect the victim from the misuse of his or her identity. (*People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808.)

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[3] Section 530.55, subdivision (b) defines personal identifying information to include, among other things, a person's name, address, telephone number, taxpayer identification number, state or federal driver's license, and social security number.

"[A] section 530.5 offense is outside the statutory scheme governing theft offenses." (*People v. Truong*, *supra*, 10 Cal.App.5th at p. 561.) "[U]se of the shorthand term 'identity theft' to describe the offense made punishable in section 530.5 does not provide a reason to read into the statute an additional element that cannot be found by referring to the language of the statute." (*People v. Barba*, *supra*, 211 Cal.App.4th at p. 227.) The legislative history "makes clear" that "the retention of personal identifying information of another is not a possession crime, but is a unique theft crime." (*People v. Valenzuela*, *supra*, 205 Cal.App.4th at p. 808.)

D. Page, Romanowski, and Gonzales

The California Supreme Court has interpreted section 490.2, petty theft, to determine whether Proposition 47 applies to vehicle theft under Vehicle Code section 10851 (*People v. Page* (2017) 3 Cal.5th 1175, 1183–1184 (*Page*)), and theft of access card account information under section 484e (*Romanowski*, *supra*, 2 Cal.5th at pp. 907–909). In these cases, the court rejected reliance on whether a statute was expressly included within the provisions of Proposition 47 as the determinative factor. (*People v. Martinez*, *supra*, 4 Cal.5th at p. 652; *Page*, at pp. 1184–1185), and it concluded that based on the plain language of section 490.2, vehicle theft and theft of access card account information were crimes of theft and are included within the scope of section 490.2 (*Page*, *supra*, at p. 1183; *Romanowski*, at pp. 912–913).

Romanowski held that even though a violation of section 484e was not included within the express provisions of Proposition 47, the offense "indicates that anyone committing theft of access card information 'is guilty of grand theft.' [Citation.] Section 484e also resides in part 1, title 13, chapter 5 of the Penal Code, which is titled 'Larceny.' In just about every way available, the Legislature made clear that theft of access card information is a theft crime." (*Romanowski*, *supra*, 2 Cal.5th at p. 908.) *Page* similarly held that "the theft form" of violating Vehicle Code section 10851 was within the theft provisions of Proposition 47. (*Page*, *supra*, 3 Cal.5th at p. 1183.)

Appellant concedes that a felony violation of section 530.5 is not specifically identified as an offense that may be reduced to a misdemeanor theft offense under Proposition 47. However, she argues that *Gonzales, supra*, 2 Cal.5th 858 reached this issue and found section 530.5 could be reduced to a misdemeanor theft conviction.

In *Gonzales*, the defendant stole his grandmother's checkbook, and went into banks on two occasions to cash checks from her account of $125 each. The defendant was charged with forgery and second-degree burglary based on the two incidents. He pleaded guilty to second degree burglary and the court dismissed the forgery charge. (*Gonzales, supra,* 2 Cal.5th at p. 862.) The defendant later filed a petition to reduce his felony burglary conviction to misdemeanor shoplifting under Proposition 47. The defendant argued his conduct would have constituted shoplifting under section 495.5 because he entered a business with the intent to take less than $950. The People replied that the defendant did not enter the bank with the intent to commit larceny, but instead to pass forged checks which constituted theft by false pretenses. The superior court denied the petition. (*Id*. at p. 863.)

Gonzales held the defendant's burglary conviction could be reduced to misdemeanor shoplifting under Proposition 47, and that defendant's act of entering the bank to cash the stolen checks constituted shoplifting even though he was not taking or stealing property from a commercial establishment. (*Gonzales, supra,* 2 Cal.5th at pp. 869–870.) "[S]ection 459.5, subdivision (b) states that '[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.' Thus, defendant would qualify for relief if he can show that his conduct would have constituted misdemeanor shoplifting, so long as he has not suffered a disqualifying conviction. [Citations.]" (*Id*. at pp. 875–876, fn. omitted.)

In reaching this conclusion, *Gonzales* rejected a hypothetical argument raised by the People in support of the assertion that commercial burglary could not be reduced to

misdemeanor shoplifting, "because he also entered the bank intending to commit identity theft. Thus, his felony burglary conviction could have been based on his separate intent to commit that offense." (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) The defendant replied that even assuming he entered the bank with the intent to commit identity theft, the shoplifting statute "would have precluded a felony burglary charge because his conduct *also* constituted shoplifting." (*Ibid*.) *Gonzales* agreed with the defendant's premise:

> "Defendant has the better view. Section 459.5, subdivision (b) requires that any act of shoplifting '*shall be charged* as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*." (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct. The statute's use of the phrase 'the same property' confirms that multiple burglary charges may not be based on entry with intent to commit different forms of theft offenses if the property intended to be stolen is the same property at issue in the shoplifting charge. Thus, the shoplifting statute *would have precluded a burglary charge based on an entry with intent to commit identity theft here* because the conduct underlying such a charge would have been the same as that involved in the shoplifting, namely, the cashing of the same stolen check to obtain less than $950. A felony burglary charge could legitimately lie if there was proof of entry with intent to commit a nontheft felony or an intent to commit a theft of other property exceeding the shoplifting limit. *That did not occur here, however*." (*Id*. at pp. 876–877, first italics in original, later italics added.)

E. Jimenez and Brayton

The California Supreme Court has granted review in a series of appellate cases that have reached opposite conclusions about whether a felony violation of section 530.5 is eligible for reduction to a misdemeanor theft offense pursuant to Proposition 47, and whether *Gonzales* affects that determination. The issue is pending before the California Supreme Court. (See *People v. Sanders* (2018) 22 Cal.App.5th 397, rev. granted July 25, 2018, S248775 (*Sanders*); *People v. Jimenez* (2018) 22 Cal.App.5th 1282, rev. granted July 25, 2018, S249397 (*Jimenez*); *People v. Liu* (2018) 21 Cal.App.5th 143, rev. granted June 13, 2018, S248130 (*Liu*); *People v. Brayton* (2018) 25 Cal.App.5th 734, rev. granted

Oct. 10, 2018, S251122 (*Brayton*); *People v. Weir* (2019) 33 Cal.App.5th 868, rev. granted June 26, 2019, S255212 (*Weir*).)

There are two cases that were decided after *Gonzales* that held a felony conviction for identity theft may be reduced to misdemeanor shoplifting under Proposition 47.

In *Jimenez, supra*, 33 Cal.App.5th 1282, the defendant was convicted of identity theft in violation of section 530.5, subdivision (a). The superior court granted his petition to reduce the felony offenses to misdemeanor shoplifting under section 459.5, subdivision (a), and the People appealed. *Jimenez* held the petition was properly granted because "[l]ike the defendant in *Gonzales*, [the defendant] cashed two stolen checks valued at less than $950 each. These acts constitute misdemeanor shoplifting under section 459.5, subdivision (a) and must be charged as such. [Citations.] The trial court correctly reduced [the defendant's] felony convictions for identity theft to misdemeanors pursuant to Proposition 47." (*Jimenez*, at p. 1285; see also *People v. Chatman* (2019) 33 Cal.App.5th 60, rev. granted June 26, 2019, S255235.)

In *Brayton, supra*, 25 Cal.App.5th 734, the defendant entered a department store, removed price tags from items, tried to return the items to the store for a refund of around $100, and used another person's driver's license to falsely identify herself. She pleaded guilty to felony identity theft in violation of section 530.5, subdivision (a). Thereafter, she filed a petition under Proposition 47 to reduce her conviction for felony identity theft to misdemeanor shoplifting, and argued *Gonzales* permitted the reduction since she could only be charged and sentenced for misdemeanor shoplifting based on her conduct. The superior court denied the petition. (*Brayton*, at pp. 736–737.)

Brayton held the defendant's felony conviction should be reduced to a misdemeanor, and cited *Gonzales's* holding that under Proposition 47, " '[a] defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct.' [Citation.]" (*Brayton, supra*, 25 Cal.App.5th at p. 738, citing *Gonzales*, *supra*,

2 Cal.5th at p. 876.) *Brayton* also cited *Gonzales* for rejecting "the claim that for consumer protection, identity theft crimes fall outside the scope of Proposition 47." (*Brayton*, at p. 738.)

Brayton concluded the defendant's identity theft crime was similar to those discussed in *Gonzales* and *Jimenez* because she used another person's driver's license to obtain credit, and her conduct fell within "Proposition 47's broad definition of shoplifting." (*Brayton, supra*, 25 Cal.5th at p. 739.)

F. Liu, Sanders, and Weir

Another series of cases that were decided after *Gonzales* held that felony convictions for identity theft are not eligible to be reduced to misdemeanor theft convictions under Proposition 47.

In *Liu, supra,* 21 Cal.App.5th 143, the defendant was convicted of multiple fraud charges, including violating section 530.5, subdivision (c)(3), fraudulent acquisition and retention of personal identifying information of 10 or more people. Her petition to reduce her felony convictions to misdemeanor was denied. (*Liu*, at pp. 146–147.) *Liu* acknowledged that "[s]ection 530.5 is not listed among the statutes reduced to misdemeanors by Proposition 47. [Citations.] Nevertheless, section 490.2, subdivision (a), which was added by Proposition 47, redefines all grand theft offenses as misdemeanors if they involve property valued at less than $950. [Citation.]" (*Liu*, at p. 150.) *Liu* posed the issue as whether "section 530.5 constitutes 'grand theft' or 'obtaining any property by theft' within the meaning of section 490.2." (*Ibid*.)

Liu rejected the defendant's reliance on *Romanowski* because the statute in that case, section 484e, "explicitly defines theft of access card information as *grand theft*. [Citation.] Therefore, it clearly constitutes '[o]ne of those "other provision[s] of law defining grand theft" for which Proposition 47 reduced punishment.' [Citation.] [¶] Section 484e requires that the information be acquired or retained without the cardholder's consent. [Citation.] The *Romanowski* court concluded that the ' "without

… consent" requirement confirms that theft of access card information is a "theft" crime in the way the Penal Code defines "theft." ' [Citation.]" (*Liu, supra,* 21 Cal.App.5th at p. 151.) *Liu* further noted that *Romanowski* addressed a statute that was "placed in a chapter of the Penal Code titled theft," and the Legislature "clearly intended that section 484e defined a theft crime, which is in the ambit of Proposition 47." (*Liu,* at p. 151.)

Liu found that section 530.5, in contrast, "does not define its crimes as grand theft, but describes them as 'public offense[s]' " (*Liu, supra,* 21 Cal.App.5th at p. 151), it "does not proscribe 'obtaining property by theft,' " and it "addresses harm much broader than theft." (*Id.* at p. 152.) *Liu* concluded the application of Proposition 47 to a violation of section 530.5 would be inconsistent with the initiative's purpose of addressing nonserious and nonviolent crimes. (*Liu,* at p. 152.)

> "Section 530.5 seeks 'to protect the victims of identity fraud, who cannot protect themselves from fraudulent use of their identifying information once it is in the possession of another, because they cannot easily change their name, date of birth, Social Security number, or address.' [Citation.] Identity fraud ' "creates ripples of harm to the victim that flow from the initial misappropriation." ' [Citation.] We are not persuaded that section 530.5 defines a 'nonserious' crime within the meaning of Proposition 47, given the far-reaching effects of the misuse of a victim's personal identifying information." (*Id.* at p. 153.)

In *Sanders, supra,* 22 Cal.App.5th 397, the defendant found a credit card that belonged to someone else and used it to purchase items at two stores. She was convicted of two counts of commercial burglary and two counts of identity theft in violation of section 530.5, subdivision (a). The superior court granted her petition to reduce the burglary convictions to misdemeanor shoplifting but held the identity theft convictions were ineligible for reduction to shoplifting under Proposition 47. (*Sanders,* at pp. 399–400, 405–406.)

Sanders held the defendant's convictions under section 530.5 were not theft offenses and were ineligible for reclassification as misdemeanor petty theft offenses under section 490.2. (*Sanders, supra,* 22 Cal.App.5th at pp. 405–406.) *Sanders* rejected

the defendant's reliance on *Romanowski* and *Page* because "[t]heft is not an element of the offense. It is the use of the victim's identity that supports the application of the statute." (*Sanders*, at p. 403.)

Sanders further held that "even though section 530.5 violations are often referred to as 'identity theft,' they are not theft offenses. Theft is not an element of the offense. The offense is not in the theft chapter (ch. 5) of the Penal Code, but is instead listed in chapter 8 dealing with false personation. The gravamen of the section 530.5, subdivision (a) offense is the unlawful use of a victim's identity. Moreover … there were multiple victims in the offenses charged. The entry into commercial establishments to obtain property by false pretenses victimized the merchant, and not the cardholder. The cardholder is a victim because her identity was unlawfully used." (*Sanders, supra*, 22 Cal.App.5th at p. 400.) The defendant's violation of the statute "was not a theft as it relates to the cardholder. It was an unlawful use, one of several unlawful uses set forth in the statute. To the extent there was a theft within the scope of the Proposition 47 limitations in section 490.2, it was against the property interest of the merchants who were defrauded by [the defendant's] presentation of the card as belonging to her, a false pretense." (*Id*. at p. 405.)

Sanders distinguished the reduction of the defendant's burglary conviction to misdemeanor shoplifting from the denial of the petition to reduce her identity theft conviction:

> "The crime of shoplifting as defined in section 459.5 was the entry into a commercial establishment, during regular business hours with the intent to commit theft of less than $950. The cardholder's property rights were not implicated by that offense, but her identity was unlawfully used. [The defendant] has received the benefit of Proposition 47's recasting of certain forms of commercial burglary. She is not, however, entitled to have her nontheft offenses of violating section 530.5, subdivision (a) reclassified under Proposition 47…." (*Sanders, supra*, 22 Cal.App.5th at pp. 405–406.)

In *Weir*, *supra*, 33 Cal.App.5th 868, the defendant was found in possession of identification cards belonging to other people. He was convicted of four counts of felony possession of personal identifying information in violation of section 530.5, subdivisions (c)(1) and (c)(2). He later filed a petition to reduce the convictions to misdemeanor petty theft under section 490.2, and it was denied. (*Weir*, at p. 870.)

Weir agreed with *Sanders* and *Liu* and held the defendant's petition was properly denied because a violation of section 530.5, subdivision (c) is a nontheft offense. (*Weir*, *supra*, 33 Cal.App.5th at p. 870.) Section 530.5 "is outside of the statutory scheme governing theft offenses; the statute resides in the chapter of the Penal Code titled 'False Personation and Cheats.' [Citations.]" (*Weir*, at p. 874.)

> "Although a violation of section 530.5 is commonly referred to as identity theft, the plain language of the statute designates a violation of this section a nontheft offense. The statute prohibits a person from acquiring, retaining, or using information, rather than taking it, an indicator that the Legislature was concerned with possession or use rather than with theft. Moreover, a violation of section 530.5 does not require the offender to take or possess another's *property*; it simply proscribes that person from retaining *information*. It also lacks a numerical threshold distinguishing misdemeanor from felony offenses, unlike many theft statutes that distinguish between grand and petty theft. [Citations.] Finally, section 530.5 also does not explicitly categorize the crime as theft or grand theft, defining the crime instead as a 'public offense.' " (*Id*. at pp. 873–874, fns. omitted.)

Weir held that a violation of section 530.5 could be distinguished from "the separate crime of stealing property under some other provision proscribing theft. Each involves a distinct victim and a distinct goal; section 530.5, as noted, protects the person whose *information* was obtained rather than the person whose *property* was taken. The perpetrator need not even be in possession of *property* that contains personal identifying information; he or she can violate section 530.5(c) by simply retaining the *information* (by memory or otherwise) and intending to use, or actually using, it to defraud the person whom it identifies." (*Weir, supra,* 33 Cal.App.5th at pp. 875–876, fns. omitted.)

Weir "refuse[d] to classify section 530.5 as a nonserious theft crime within the meaning Proposition 47," for an additional reason. (*Weir, supra,* 33 Cal.App.5th at p. 880.)

> "Our conclusion is further supported by Proposition 47's amendment of section 473. Proposition 47 added section 473, subdivision (b) to allow misdemeanor treatment of a forgery offense with a value of $950 or less, with the qualifier that *'[t]his subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.' This provision further illustrates that section 530.5 is regarded as a serious crime that falls outside the scope of Proposition 47's reclassification scheme*. [¶] Reclassifying section 530.5 nontheft offenses as misdemeanors regardless of the nonmonetary ramifications would be contrary to Proposition 47's intent. Pending further guidance from our Supreme Court, we are hesitant to take such an expansive view of section 490.2 as to allow this reclassification. The Legislature clearly can amend either statute if it disagrees with our interpretation, but as an intermediate Court of Appeal, we refuse to usurp the role of the Legislature by rewriting statutes. [Citation.]" (*Id.* at p. 881, italics added.)

Finally, *Weir* acknowledged defendant's reliance on *Gonzales* but concluded the court's discussion of identity theft was dicta.

> "Section 459.5, subdivision (a), defines the crime of shoplifting as 'entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).' *Gonzales* in dicta suggested that the defendant also could not be charged with felony burglary under the theory that he entered with the intent to commit identity theft, because subdivision (b) of this statute 'prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct ... if the property intended to be stolen is the same property at issue in the shoplifting charge.' [Citation.] *Gonzales* is not controlling here, as defendant … did not use the personal identifying information he had obtained to steal any property, and he was not charged with a separate theft offense. Therefore, his offense [for violating section 530.5] was not eligible for resentencing under section 459.5, subdivision (a) as misdemeanor shoplifting, as was the case of the defendant in *Gonzales*." (*Weir, supra,* 33 Cal.App.5th at p. 877, fn. 10.)

G. Analysis

The superior court properly denied appellant's petition to reduce her felony violation of section 530.5 to a misdemeanor theft-related offense. Appellant was convicted of committing a crime against A.L. for willfully obtaining and using his or her personal identifying information without his or her consent. We agree with *Sanders*, *Liu*, and *Weir*, that section 530.5 is not a theft offense and a felony conviction of that statute is not eligible for reduction to a misdemeanor under Proposition 47, since the offense does not require any financial loss to the victim and it has historically been classified as a nontheft offense. In addition, as explained in *Weir*, Proposition 47 also added section 473, subdivision (b) to allow misdemeanor treatment of a forgery offense, with the limitation that this " 'subdivision shall not be applicable to any person who is convicted of both forgery and identity theft, as defined in Section 530.5.' " (*Weir, supra*, 33 Cal.App.5th at p. 881.)

We further find *Gonzales* did not extend identity theft to reach nontheft crimes. We agree with *Weir* that *Gonzales's* discussion of identity theft was dicta and not necessary to the court's ultimate holding.

DISPOSITION

The judgment is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
PEÑA, J.